(2009) 02 DEL CK 0292

Delhi High Court

Case No: Criminal Appeal 196 of 2005

Bhringu Nath		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Feb. 26, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 376

Hon'ble Judges: Pradeep Nandrajog, J; Aruna Suresh, J

Bench: Division Bench

Advocate: Poornima Sethi, for the Appellant; Richa Kapoor, for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.

Crl.M.(B.) No. 252/2008

Since the appeal itself is being heard today for disposal, the application seeking suspension of sentence is dismissed as infructuous.

CRL.A. 196/2005

1. The appellant has been convicted for the offence punishable u/s 376 IPC. The judgment and order is dated 30.11.2004. Vide order of sentence dated 1.12.2004, the appellant has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to undergo RI for 6 months.

2. It is urged by learned Counsel for the appellant that no semen was detected from the frock of the victim and that the doctor concerned has not ruled out the possibility of the injury sustained by the victim in her private parts to be the result of a fall on a hard object, the finding of guilt returned by the learned Trial Judge cannot be sustained. It is

additionally urged that the parents of the victim i.e. PW-1 and PW-2 have deposed at variance on the point as to who reached the jhuggi of the appellant first and for said reason neither can be believed.

3. We note that when the incriminating circumstances were put to the appellant i.e. when he was examined u/s 313 Cr.P.C, the appellant stated:

I am innocent. No such crime was ever committed by me. There was dispute between me and mother of the prosecutrix on water. On the day of incident, ''M'', the little child fell on the brick while playing in the gali and being elder on humanitarian grounds I picked her up and on it complainant implicated me falsely in this case. I have also my grand-son and grand-daughter.

4. The date was 28.1.2001. ''M'' aged 1 1/2 years was playing outside her jhuggi. Her mother Ajab Nisha PW-1, was inside the jhuggi. She heard the cries of her child and went outside. The cries attracted her to an adjoining jhuggi (the residence of the appellant). She pushed the door and went inside. She saw her daughter lying on a bori (jute bag) inside the jhuggi. She saw that the underwear of the accused was stained with blood. Ajab Nisha cried and this attracted her husband Mohd.Israel PW-2, as also people in the neighbourhood. The appellant attempted to flee but was nabbed by the residents of the locality. He was beaten. The police was informed. SI Sanjiv Sharma PW-10, accompanied by Const.Hari Kishan PW-6, reached the spot.

5. In the meanwhile, the injured child was removed to the hospital in a PCR van by HC Abdul Rehman PW-7. At the hospital, Dr. Seema Prakash PW-11, examined the victim and prepared the MLC Ex.PW-11/A recording as under:

Bleeding P/V after the incident.

Child was not wearing undergarments at the time of incident and allegedly removed by accused before assault. The frock to be sealed which was worn at the time of incident.

L/E Hymen could not be examined as child is irritable.

Dried up ï¿½ secretions seen along with blood stains over Latia minora and magora. No active bleeding p/v.

6. She recorded the opinion that there may be possibility of forceful penetration into private part of the victim as perineal tear was seen on EUA.

7. During trial, Dr. Seema Prakash PW-11 on cross-examination deposed:

There was no injury on the Livea majora or minora. Perineal tear can be caused by any penetration other than male organ in case the baby falls and there is some projection such like injury may be caused.

8. It is apparent that the appellant admitted his presence with the victim, but sought to explain the injury on the private parts of the victim, taking a cue from the opinion of the doctor and hence stated that the child fell on a brick and out of compassion he picked up the child.

9. Whether this has happened or not would be determined on the analysis of the evidence. Ajab Nisha PW-1, the mother of the victim deposed the facts as noted herein above by us in para 4 above. Relevant would it be to note that Ajab Nisha categorically deposed that she saw her child in the jhuggi of the deceased and was lying on a bori (jute bag). She also deposed that she saw the accused pulling up his knickers.

10. We note that Ajab Nisha has not been cross-examined with respect to said two statements of fact made by her. No suggestion has been given to her that she did not saw her daughter inside the jhuggi of the appellant. No suggestion has been given to her that the accused was comforting her daughter. We note that the only suggestion given to her is that she was falsely implicating the accused; a suggestion which was denied.

11. Mohd. Israel PW-2, the father of the victim also deposed on the lines of PW-1. He deposed that he reached the jhuggi of the appellant on hearing the screams of a child and saw the appellant having sexual intercourse with his daughter. He deposed that on seeing him, the appellant tried to flee, but was caught. That he saw his daughter bleeding from her private parts. He saw his wife who took the child in a PCR van.

12. We notice that there is a slight variation in the testimony of PW-2 and PW-1, as to who reached the jhuggi first. But the said fact is neither here nor there for the reason, both the witnesses come from a humble background. Who reached first was an immaterial point in issue. The fact of the matter remains that both of them had reached the jhuggi where the offending act was done.

13. Pertaining to the deposition of PW-2, relevant would it be to note that during cross-examination his statement in examination-in-chief that he saw the accused and his daughter inside the jhuggi of the accused has not been questioned. Further, he has not been subjected to any meaningful cross-examination pertaining to his statement that his daughter was bleeding from her private parts.

14. We note that these very questions were addressed before the learned Trial Judge who has held that the defence version has to be thrown in the dustbin, for the reason the testimony of PW-1 and PW-2 shows that the parents responded to the cries of the young victim and the place from where the cries were emanating was the jhuggi of the appellant and that the appellant had not challenged their testimony with respect to the said fact. Meaning thereby, the appellant did not challenge the testimony of the parents of the victim on the point they saw the victim inside the jhuggi of the appellant and the appellant was inside the jhuggi and attempted to flee on seeing the father of the victim.

15. Indeed, the learned Trial Judge is correct. If the child had sustained the injury as claimed by the appellant and had he responded to the cries of the child, who, as per his version fell on a brick, his conduct would have been to rush the child to the house of her parents and not take the child to his jhuggi and go about removing her underwear.

16. Before concluding, we may note that the appellant was examined by Dr. V.K. Jain PW-5, who, as per his report Ex.PW-5/A, has opined that the appellant is capable of performing sex. We note that the appellant refused to give his semen sample.

17. The contention that no semen was found on the frock of the young victim is neither here nor there for the reason as deposed to by PW-1 and PW-2, when they saw their daughter her underwear had been removed. The possibility of the frock being pulled up and going much above the waist of the young victim cannot be ruled out and this explains no semen dropping on the frock.

18. We see no reason to differ with the view taken by the learned Trial Judge, neither on the conviction, nor on the sentence.

19. The appeal is dismissed.